74-634

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
DEC 26 1974
MICHAEL RODAK, JR., CLERK

NO._____

UNITED STATES OF AMERICA, Petitioner

v.

ROBERT LEE NOBLES, Respondent

The Respondent, ROBERT LEE NOBLES, who is presently incarcerated at the Federal Correctional Institution, Leavenworth, Kansas, by his undersigned counsel, asks leave to file the attached Brief Opposing Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without payment of costs and to proceed in forma pauperis pursuant to Rule 53.

The affidavit of Respondent's counsel in support of this motion is attached hereto.

NICHOLAS R. ALLIS
Deputy Federal Public Defender

BEST COPY AVAILABLE

FPI-Sandstone
8-1-74—100M—1073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

UNITED STATES OF AMERICA, Petitioner

v.

ROBERT LEE NOBLES, Respondent

AFFIDAVIT

I, Nicholas R. Allis, being first duly sworn according to law, depose and state, in support of Respondent's motion for leave to proceed without being required to prepay costs for fees:

1. I am a Deputy Federal Public Defender for the Central District of California appointed pursuant to the Criminal Justice Act of 1964 to represent the Respondent at trial and on appeal to the United States Court of Appeals for the Ninth Circuit.

2. I am satisfied that his financial obligations and his income are substantially the same as at the time of my initial appointment. Consequently, because of his poverty he is unable to pay the costs of said cause and he is unable to give security for the same.

FPI-Sandstone
5-1-74—100M—1073

3. Petitioner believes that he is entitled to the redress he seeks in said cause.

Nicholas R. Allis

NICHOLAS R. ALLIS
Deputy Federal Public Defender

SUBSCRIBED AND SWORN to before me this DEC 24 1974 day of December, 1974.

Minna Neumaier

Notary Public

OFFICIAL SEAL
MINNA NEUMAIER
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Commission Expires Apr 5, 1977

FPI-Sandstone
5-1-74—100M—1073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

UNITED STATES OF AMERICA, Petitioner

v.

ROBERT LEE NOBLES, Respondent

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

JOHN K. VAN DE KAMP
Federal Public Defender

NICHOLAS R. ALLIS
Deputy Federal Public Defender

Rm 707, United States Courthouse
312 N. Spring Street
Los Angeles, California 90012
Telephone: (213) 688-4796

Counsel for Respondent

FPI-Sandstone
5-1-74—100M—1073

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Order Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	6
Reasons for Not Granting the Writ	12
Conclusion	39
Certificate of Service	40
Appendix	
Opinion of the United States Court Of Appeals for the Ninth Circuit	A
Judgment of the Court of Appeals	B
Court of Appeals Suggestion for Rehearing en banc	C

FPI-Sandstone
5-1-74—100M—1073

TABLE OF AUTHORITIES

Cases	Page(s)
Alford v. United States 282 U.S. 687, 691, 692 (1931)	34
Alma Motor Co. v. Timken Detroit Axle Co., et al. 329 U.S. 129, 136 (1946)	14
Ashwander v. Tennessee Valley Authority 297 U.S. 288, 347 (1935)	14
Barr v. Matteo 355 U.S. 171, 172 (1957)	15
Berger v. United States 295 U.S. 78 (1935)	37
Boyd v. United States 116 U.S. 616 (1886)	21, 22, 28
Brady v. Maryland 373 U.S. 83 (1963)	25
Brooks v. Tennessee 406 U.S. 605, 610-11 (1972)	21
Bruton v. United States 391 U.S. 123 (1968)	33
Caldwell v. United States 205 F.2d 879 (D.C. Cir. 1953)	31
Charles River Bridge v. Warren Bridge 11 Pet. 420, 553 (1837)	15
Coplon v. United States 191 F.2d 749 (D.C. Cir. 1951)	31
Garrity v. New Jersey 385 U.S. 493, 500 (1967)	11, 32
Glasser v. United States 315 U.S. 60, 76 (1942)	30

FPI-Sandstone
8-1-74—100M—1073

TABLE OF AUTHORITIES (CONT'D)

Cases	Page(s)
Griffin v. California 380 U.S. 609 (1965)	23
Griffin v. Illinois 351, U.S. 12 (1956)	30
Hickman v. Taylor 329 U.S. 495 (1947)	29, 2
Hoffa v. United States 385 U.S. 293, 304 n.7 (1966)	25, 31
Hoffman v. United States 341 U.S. 479, 486 (1951)	25
Jones v. Superior Court 58 Cal. 2d 56, 60, 22 Cal Rptr 879	26
Kirby v. United States 174 U.S. 47, 55, 56 (1899)	33
Light v. United States 220 U.S. 523, 538 (1911)	14
Malloy v. Hogan 378 U.S. 1 (1964)	23
Miranda v. Arizona 384 U.S. 436, 460 (1966)	26, 28, 38
Murphy v. Waterfront Comm'n of New York Harbor 378 U.S. 52, 55 (1964)	24
Pointer v. Texas 380 U.S. 400, 403 (1965)	33
Powell v. Alabama 287 U.S. 45, 69 (1932)	30
Prudhomme v. Superior Court of Los Angdes County 2 Cal. 3d 320,326, 85 Cal.Rptr 129,137 (1970)	25

FPI-Sandstone
8-1-74—100M—1073

TABLE OF AUTHORITIES (CONT'D)

Cases	Page(s)
Schmeber v. California 384 U.S. 757, 761 (1966)	22
Siler v. Louisville & Nashville R. Co. 213 U.S. 175, 193 (1909)	14
Simmons v. United States 390 U.S. 377, 392 (1968)	23
Slochower v. Board of Education 350 U.S. 551 (1956)	21
Spector Motor Co. v. McLaughlin 323 U.S. 101, 105 (1944)	14
Spevack v. Klein 385 U.S. 511 (1967)	21, 23
United States v. Germany 32 F.R.D. 421 (M.D. Ala. 1963)	30
United States v. Judson 322 F.2d 460 (9thCir. 1963)	22
United States v. Venuto 182 F.2d 519 (3d Cir. 1950)	32
United States v. White 322 U.S. 694 (1944)	22, 24
United States v. Wright 489 F.2d 1181, 1195 (C.A.D.C)	13, 20, 23, 25
Williams v. Florida 399 U.S. 78, 82 (1970)	26
Constitution and statutes:	
United States Constitution,Fifth Amendment	21,22, 23, 24, 25, 26, 27, 28
United States Constitution, Sixth Amendment	28, 29, 30, 31, 32

FPI-Sandstone
5-1-74—100M—1073

TABLE OF AUTHORITIES (CONT'D)

	Page(s)
Supreme Court Rules, Rule 19(1)	12
The Jencks Act, 18 U.S.C. §3500	14, 18, 19, 20
Federal Rules Criminal Procedure	14, 15,16, 17, 18, 19, 20, 26
Proposed Federal Rules of Criminal Procedure	18
Proposed Federal Rules of Evidence	20, 29
Miscellaneous:	
Formal Opinion No. 23, A.B.A. Committee on Professional Ethics	29
A.B.A. Standards, Providing Defense Service §1.5 (Approved Draft, 1968)	30
A.B.A. Standards, The Defense Functions §4.1 (Approved Draft, 1971)	30
Annotation, Development, since Hickman v. Taylor, of attorney's Work Product Doctrine, 35 ALR 3d 412	29
Wright, Federal Practice and Procedure, Vol. I, §251, at 490	5
8 J. Wigmore, Evidence (McNaughton Rev. 1961)	22
Stern, R. and Gressman, E., Supreme Court Practice (4th Ed. 1969)	13
Comment, "'Work Product' in Criminal Discovery" 1966 Wash. U.L.Q. 321 (1966)	17
Note Developments in the Law, Discovery 74 Harv. Law Rev. 941, 1063 (1961)	19
M. Moore, "Criminal Discovery", 18 The Hastings Law Journal, 865, 907 (1968)	24

FPI-Sandstone
5-1-74—100M—1073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

UNITED STATES OF AMERICA, Petitioner

v.

ROBERT LEE NOBLES, Respondent

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The Respondent, through his counsel, hereby opposes the petition of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-captioned case.

OPINION BELOW

The opinion of the court of Appeals (Appendix A) is reported at 501 F.2d 146.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1974 (Appendix B). On September 23, 1974, the court of appeals denied a petition for rehearing with a suggestion for rehearing en banc (Appendix C). By order of October 12, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 22, 1974. The petition was received by respondent's attorney on November 27, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether in a criminal trial, prior to the direct examination of a defense investigator, called by the defense to impeach the testimony of a government witness, the trial court may order the witness not to testify unless he provides the prosecutor portions of his investigative report to defense counsel relating to the subject matter of his testimony.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment:

> No person * * * shall be compelled in any criminal case to be a witness against himself.

Constitution of the United States, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, to have the Assistance of Counsel for his defense.

18 U.S.C. §3500 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

FPI-Bandstone
8-1-74—100M—1073

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

. . . .

(e) The term "statement", as used in subsections (b),(c) and (d) of this section in relation to any witness called by the United States, means-

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Rule 16 of the Federal Rules of Criminal Procedure provides in pertinent part:

FPI-Sandstone
5-1-74—100M—1073

(b) Other Books, Papers, Documents, Tangible Objects Or Places

... Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. §3500.

(c) Discovery By The Government

If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other

FPI-Sandstone
5-1-74—100M—1073

internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

FPI-Emeryville
8-1-74—100M—1073

STATEMENT OF THE CASE

1. Respondent, Robert Lee Nobles, was convicted in the United States District Court for the Central District of California along with two other men, Tommie Louis Brown and Virgil David Swain, of bank robbery and assault with a dangerous weapon during the commission of the robbery, in violation of 18 U.S.C. §2113(a)(d). [R.T. 788] [1/] On May 21, 1973, Mr. Nobles and the other two men were sentenced to twenty-five years imprisonment pursuant to 18 U.S.C. §4208(a)(2). The United States Court of Appeals for the Ninth Circuit affirmed the convictions of Swain and Brown, but reversed the conviction of Robert Lee Nobles. [hereinafter respondent Mr. Nobles]

2. On February 6, 1973, at about 11:00 a.m. four black males robbed the Crocker National Bank at 4117 West Pico Boulevard in Los Angeles. The fourth man was a fugitive at the time of the trial.

The evidence against Tommie Louis Brown and Virgil David Swain was similar and consisted primarily of surveillance photographs, items taken from the apartment they shared, a comparison of photographs, eye witness identifications, and a statement by Brown. The evidence against Mr. Nobles consisted of an ambiguous statement and the testimony of two eyewitnesses.

Robert Lee Nobles was arrested at a bar by two agents who had their guns drawn. [R.T. 431, 437] He denied that he was Robert Lee Nobles and later stated that he knew the F.B.I. had been looking for him. [R.T. 433, 439]

1/ R.T. refers to Reporter's Transcript of Court Proceedings

The first eye witness to testify was Peter Van Gemeren, a teller stationed at the fourth window. He estimated the men were in the bank from five to severn minutes. [R.T. 33] He noticed all four robbers but paid closest attention to Brown and the robber who did not stand trial. [R.T. 35, 38] Brown was two feet away from him for one to one and a half minutes and from two to fifteen feet from him for three to four minutes.

He identified Robert Nobles as the man standing under the surveillance camera. This man was the furthest away from him, about twenty feet, of any of the four robbers. [R.T. 38] Moreover, a post stood between him and the surveillance camera which he testified was 7 inches wide but which was later shown to be 20 inches by 11 3/4 inches. [R.T. 535]

He didn't remember whether the man under the surveillance camera was faced towards him or away from him, but thought that his side was visible for a "half a minute." [R.T. 38, 39] For "most of the time" the man's back was to him. [R.T. 39] Van Gemeren told the F.B.I. approximately two weeks after the robbery that the man under the surveillance camera was facing towards the bank manager. [R.T. 58, 60, 70] The manager was seated behind the business counter, and thus the robber would have had to be facing away from Van Gemeren.

He could not recall whether the man was wearing a hat or jacket. [R.T. 33-34] He could not recall the exact date of the robbery. [R.T. 43] He could not recall whether it was the F.B.I. or Los Angeles Police Department Officials who interviewed him two weeks after the robbery or on other occasions. [R.T. 42, 70] When asked if he had told the F.B.I. two weeks after the robbery that the man under the surveillance camera had "black hair, worn bushily" and wore a "floppy hat," Van Gemeren turned to the judge and stated,

"Your Honor, that interview was many weeks ago. I cannot recall what I said." [R.T. 64] He couldn't recall on April 11th the fact that on April 10th he testified that he could not recall whether the man was looking toward him or away from him. [R.T. 88] He couldn't recall whether he had told Federal Public Defender Investigator, John Bond that the only part of the man he had seen was his back. [R.T. 89, 90] He also couldn't recall whether the day on which John Bond interviewed him was closer in time to the day of the bank robbery than "today." [R.T. 100] He did not recall telling Mr. Bond and the United States Attorney that when Elaine Zanders fainted, he went to her aid. [R.T. 95]

The first time Van Gemeren saw Nobles after the day of the robbery was over two months later, on the morning of the trial. The prosecutor told him to go into the courtroom and look at the three defendants to see if he could recognize any of them. [R.T. 82-84] Van Gemeren went into the courtroom and sat down in the second or third row. He saw the defendants seated in the first row, ahead of him and to his left. He decided, based on this observation, that Robert Lee Nobles was one of the robbers. [R.T. 82-84]

Gary Hoffman identified Robert Nobles as the man who was standing underneath the surveillance camera. [R.T. 325]

Hoffman was standing with his back against the business counter, 24 feet away from the surveillance camera. [R.T. 318, 327] He said the robbery lasted from 5-8 minutes and he focused on Robert Nobles for 2-3 minutes. [R.T. 328]

However, he also testified that he observed Brown working behind the tellers cages for three or four minutes, then watched him jump the counter at the rear and exit the bank. [R.T. 343, 344] Moreover, he admitted telling John Bond that the one he could see most clearly was the

fourth bank robber who did not stand trial. [R.T. 417] Hoffman said the man under the camera was generally facing toward the teller area, and then occasionally shifting to his right. [R.T. 351] Hoffman testified directly contrary to Van Gemeren when he stated he did not recall the man under the surveillance camera facing "the business counter at any time." [R.T. 353]

Hoffman said that when he met with F.B.I. agent Wilkins seven weeks after the robbery, he hoped that the meeting would not be a waste of time and that he would be able to pick out somebody from the photographs. [R.T. 394] Hoffman told Agent Wilkins, at that time, that he could only give him a general discription. He picked out the photograph of Nobles from a group of six pictures, but was not absolutely sure that Nobles was the man under the surveillance camera. [R.T. 401]

Two days later, on March 30th, he attended a lineup and picked Robert Nobles out of the lineup although he was not 100% sure that he was the man under the surveillance camera. [R.T. 404]

Hoffman testified that the robber who was underneath the surveillance camera was the one he saw most clearly and then admitted that he told John Bond of the Federal Public Defender's Office that "the man who was standing at the teller's cage directly across from [him] was the one [he] could see more clearly and would be able to identify." [R.T. 417] That man was the fourth robber who did not stand trial. However, he denied telling Mr. Bond that all blacks look alike. [R.T. 404]

The defense offered the alibi testimony of respondent's friend, Susan Mathis, who testified that she had been with respondent during the period of time when the robbery occured.

The defense also intended to call as a witness an expert in eyewitness identification but the Court refused to allow him to testify.

3. Prior to trial, John Bond, the Chief Investigator for the Federal Public Defender's Office, had interviewed the two eyewitnesses, Hoffman and Van Gemeren and written reports of those interviews to defense counsel. On cross-examination Hoffman denied telling Bond that all blacks look alike. [R.T. 404] The other witness, Van Gemeren, testified that he did not recall telling Bond that he had seen only the back of the bank robber. [R.T. 88]

Defense counsel's offer of proof was that John Bond would testify that Hoffman told him that "all blacks look alike" [C.T. 85], and that Van Gemeren told him that "as far as the man at the surveillance camera is concerned, he [Van Gemeren] only saw the back of that man." [R.T. 528] The Court ordered that the investigator not testify to these statements unless defense counsel was prepared to turn over to the government at the completion of the investigator's testimony "the alleged statements. . . as contained in . . . [John Bond's] report." [R.T. 519-20]

Defense counsel refused to turn over to the government portions of the investigator's report to him and pursuant to the court order, John Bond did not testify to the prior inconsistent statements. The reports were placed under seal for the Court of Appeals.

4. In reversing the conviction of respondent, the Court of Appeals held that the trial Court's order directing defense counsel to surrender to the government portions of his investigator's report to him constituted prejudicial error. The Court held that the order violated respondent's Fifth Amendment privilege against self-incrimination

and the provisions governing discovery set forth in Rule 16 of the Federal Rules of Criminal Procedure.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

1. The Supreme Court Should Not Grant The Petition For A Writ Of Certiorari Since There Are No "Special And Important Reasons" For Reviewing The Decision Of The United States Court Of Appeals

Rule 19 (1) of the Supreme Court Rules provides that review on a writ of certiorari "will be granted only where there are special and important reasons therefor", such as,

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Respondent submits there are no "special and important" reasons for reviewing the decision of the United States Court of Appeals for the Ninth Circuit in United States v. Nobles.

The Court of Appeals did not depart "from the accepted and usual course of judicial proceedings," nor did the court

sanction "such a departure by a lower court, as to call for an exercise of this court's power of supervision." On the contrary, the Court of Appeals corrected the trial court's departure from accepted trial procedure when it disapproved of the enforced production of defense investigation reports in the absence of any showing that the investigator had refreshed his recollection with these reports.

There is no conflict between the decision of the Court of Appeals in United States v. Nobles and the decision of any other Court of Appeals. In fact, this decision is patterned after and based on an opinion of the United States Court of Appeals for the District of Columbia in the only other federal decision dealing with the issue. United States v. Wright, 489 F.2d 1181, 1195 (C.A.D.C.).

Nor does the opinion in United States v. Nobles decide "a federal question in a way in conflict with applicable decisions" of the Supreme Court. That such a "conflict must be direct is emphasized by the fact that although old Rule 38 (5) (b) required only a showing that the decision of the Court of Appeals is 'probably' in conflict with applicable Supreme Court decisions, the present Rule 19 (1)(b) omits the word 'probably'." Stern, R. and Gressman, E., Supreme Court Practice, §4.5 (4th Ed. 1969).

Petitioner states that as to that part of the Court of Appeals decision which is based on the Fifth Amendment, ". . . the decision of the court is in conflict on many fronts with the philosophy of the prior decisions of this court. [Petition at 14]. The cases cited by petitioner do not support this thesis. In any event, there is certainly no decision of the

Supreme Court with which the opinion of the Court of Appeals is in direct conflict within the meaning of Rule 19 (1)(b).

Finally, this case does not present an important question of federal law which has not been, but should be, settled by the Supreme Court. The inviolability of defense documents such as the report at issue in this case, is a principle of long-standing, properly reiterated in the opinion of the Court of Appeals.

The government's argument as to why the Supreme Court should grant the petition for a writ of certiorari is premised on the proposition that the case presents an issue under the Fifth Amendment. However, the Court of Appeals based its decision on a non constitutional grounds as an alternative to the Fifth Amendment. In the present case, as was recognized by the Court of Appeals, the statutory scheme consisting of the Federal Rules of Criminal Procedure, the Jencks Act, and the common law applicable to the admissibility of documents clearly prohibit the forced production of the report in question. Therefore, the Supreme Court need not decide the constitutional issue. The practice of the Court has been to refuse to reach a constitutional issue when there is a non-constitutional basis for the decision. Alma Motor Co. v. Timken-Detroit Axle Co., et al, 329 U.S. 129, 136 (1946); Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 193 (1909); Light v. United States, 220 U.S. 523, 538 (1911); Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944); See Brandeis J., concurring in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936). This Court has stated that "the principle of avoiding constitutional questions is one which was conceived out of considerations of sound judicial administration. It is a traditional policy of our courts." Alma Motor Co. v.

Timken Co., supra at 142; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 553 (1837); Barr v. Matteo, 355 U.S. 171, 172 (1957).

2. Rules Governing Discovery Effectively Prohibited Court From Ordering Disclosure Of Portions Of Report

Rule 16 of the Federal Rules of Criminal Procedure[3] strictly and specifically limits prosecution discovery. Subsection 16 (c) which governs prosecution rights to discovery, permits government inspection of defense documents which will be introduced at trial.[4] In this case there was no intention to introduce the investigator's report at trial.

[3] The 1966 revision of the Rules represented a break with the established policy of non-disclosure by the defendant. Before enactment of Rule 16, a practice of non-disclosure on both sides had been customary. United States v. Hughes, 413 F.2d 1244, 1249 (5th Cir. 1969). At the time Rule 16 was first recommended in 1944, it was thought doubtful that the law allowed any discovery in a criminal case. Wright, Federal Practice and Procedure, Vol I, §251, at 490. It was not until 1966, that Rule 16 was amended to give any discovery powers to the prosecution, and even then the government was granted only "a limited right of discovery under certain circumstances." Wright, supra, at 492. Even this minor change was opposed by two members of the Court. Justice Black wrote a vigorous dissent in which he warned, ". . . some of the proposed rules go to the very borderline if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself." Order of February 28, 1966 Amending Criminal Rules, 383 U.S. 1032 (1966).

[4] The subsection only applies as a reciprocal right for the government when the defense has been granted discovery under the other subsections of Rule 16. Here, there was no finding by the court in connection with the government request, that the defense had been granted discovery rights.

Most significantly, the Rule 16(c) provides in its work product savings clause,[5] that,

> Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

[5] "Although the . . . policies supporting protection of an attorney's work product were stated with reference to civil litigation, they are even more strongly applicable in criminal proceedings. There is "an especially strong tendency toward the protection of materials as the 'work product' of an attorney in criminal cases. Thus, in relevant criminal cases (admittedly few), the courts have consistently held statements by witnesses . . . to be the 'work product' of an attorney." Annot. 35A, L.R.3d 424 (1971) (footnotes omitted)(emphasis added). In State v. Montague, 101 N.J. Super. 483, 244 A.2d 699 (1968) the State sought access to the defendant's attorney's notes concerning interviews with prospective witnesses. The Court states:

> "[W]e are satisfied that the notes here in question represented the work product of defendant's attorney and under the doctrine of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), production should not have been compelled. The fears therein expressed with regard to the inviolability of an attorney's thoughts and the possibility of inefficiency, unfairness and sharp practice are equally applicable to the setting of a criminal case." 244 A.2d at 702.

The same result has been reached with respect to the defendant's demands to examine materials (especially prospective witnesses' statements) in the hands of the prosecuting attorney. See State v. Bowen, 104 Ariz. 138, 449 P.2d 603, 607 (1969); State v. Superior Court, 99 Ariz. 382, 409 P.2d 547, 548 (1966); Fisher v. State, 241 Ark. 545, 408 S.W. 2d 894, 897 (1966); Edens v. State, 235 Ark. 178, 359 S.W. 2d 432,433 (1962); People v. Boehm, 270 Cal. App.2d 13, 75 Cal. Rptr. 590, 595-596 (1969) [further citations omitted]"

5/ (cont'd) In Re Grand Jury Proceedings, Duffy v. United States, 473 F.2d 840, 846 (8th Cir. 1973); United States v. Nobles, App.A, infra, at page 16A n.5 .; See also Comment, "'Work Product'" in Criminal Discovery", 1966 Wash. U.L.Q. 321 (1966). The constitutional protections of the Fifth and Sixth Amendments which shield defendant in a criminal case are broader and more complete than the protection offered by the work product rule. See parts 3 & 4 infra.

Thus, the rule specifically forbids government discovery of the investigator's report in this case, both because it is an internal defense document and because it is a statement of a government witness to an agent of the defendant. The proposed Amendments to the Rules leave unchanged this provision.

Petitioner claims that Rule 16 was "clearly intended to apply only to pre-trial discovery." [Petition at 23] However, the policy considerations supporting the work product savings clause of the rules are the same during the course of the trial as before trial. Moreover, subsection (b) of Rule 16, in setting limits to government discovery, provides, in pertinent part, that,

> This rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. §3500. [Jencks Act] (emphasis added)

The Court of Appeals properly concluded that this reference to the Jencks Act indicates that Rule 16 has relevance not only to pretrial discovery but also to the production of documents during trial. App. A, infra, p. 17A .

Though Rule 16 provides for reciprocity of disclosure, the Advisory Committee was careful not to expand prosecution discovery to the extent of defense discovery. The philosophy of criminal discovery is inconsistent with total reciprocity and "any suggestion that the state must have at least as good a chance as the defendant to prevail would seem to violate the traditional policy of favoring the defendant in order to avoid

conviction of the innocent." Note, "Developments in the Law, Discovery" 74 Harv. Law Rev. 941, 1063 (1961).

The Jencks Act, 18 U.S.C. §3500, is consistent with the limited authority for prosecution discovery found in Rule 16 and with the policy of limited reciprocity of disclosure. Section 3500, though expansive of defendant's post-testimony discovery powers over statements of government witnesses, provides for no reciprocal right of the government to statements collected in defense files. Not only does Section 3500 not authorize a trial judge to order disclosure of defense witness reports, it implicitly prohibits such a procedure. Thus, the Supreme Court in interpreting §3500 has emphasized that it is the exclusive authority by which disclosure during trial may be compelled. Thus, in Palermo v. United States, the court stated, ". . . statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. §3500 cannot be produced at all." 360 U.S. 343, 351 (1959). Absent any statutory compulsion similar to §3500, the exclusive terms of §3500 indicate that a court has no authority to require the defendant to surrender witness statements to the government.

The thrust of petitioner's argument is that this court should adopt a common law rule of evidence which would require defense counsel to turn over an investigator's portions of reports of interviews with witnesses after the investigator testifies for the defense on direct examination. 6/

6/ The petitioner's reasoning that the Court of Appeals decision may "foster misstatement, exaggeration, or even perjury on the part of . . . partisan investigators . . . " is misplaced. If a particular investigator is prone to exaggeration or perjury he can as easily misstate the interview in his report as on the stand. The appropriate method of impeaching the investigator in that situation as well as this, is to rehabilitate the government witness who can testify in rebuttal. Comments in footnote 8 of the petition at page 23 indicate that both the dissenting judge and petitioner were unaware of the fact that the original of the investigator's report in this case was placed under seal during the trial for the benefit of the Cort of Appeals. The report contains the exact words which defense attorney professed as Mr. Bond's impeaching testimony.

Such a rule would constitute legislating by the judiciary of a modified Jencks Act applicable to the defense. Not only would the rule significantly alter traditional trial procedures, but it would intrude upon an area in which Congress and the rule makers have spoken clearly in both the Federal Rules of Criminal Procedure and the Jencks Atc. See United States v. Wright, 489 F.2d 1181, 1190 (D.C. Cir. 1973) 7/

7/ The rule sought by petitioner also would modify Rule 612 of the Proposed Federal Rules of Evidence which provides that,

> "Except as otherwise provided in criminal proceedings by 18 U.S.C. §3500, if a witness uses a writing to refresh his memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness . . . ."

As noted by the court in United States v. Wright, 489 F.2d at 1191, "[t]he government's proposal would have us [do] away with the requirement that the statement be used to refresh recollection either before or while testifying."

3. The Court's Order Violated Defendant Nobles' Right Against Self-Incrimination Guaranteed By The Fifth Amendment

The Court of Appeals need not have considered the Fifth Amendment in reaching its decision. However, the Court was correct in finding that the Amendment prohibits government discovery of the defense investigator's report.

The United States Supreme Court has held, "There are rights of a constitutional stature whose exercise a State may not condition by the exaction of a price." Garrity v. New Jersey, 385 U.S. 493, 500 (1967). In this case, the respondent paid a double price for exercise of his Fifth Amendment right against self-incrimination. Not only was respondent forced to forfeit valuable testimony tending to impeach the prosecution's best identification witness, but respondent suffered irreparable prejudice when the U.S. Attorney called the jury's attention to respondent's failure to produce that testimony. This Court traditionally has been solicitous about the Fifth Amendment rights of defendants and has refused to allow the government to obviate those rights by indirection and manipulation. Boyd v. United States, 116 U.S. 616 (1886) (in a civil forfeiture action, court would not condone the choice between producing a document or forfeiting his goods); Slochower v. Board of Education, 350 U.S. 551 (1956) (public school teacher cannot be discharged merely because he invoked Fifth Amendment); Garrity v. New Jersey, supra, (policeman cannot be forced to chose between his job and taking the Fifth); Spevack v. Klein, 385 U.S. 511 (1967) (attorney cannot be disbarred because he invoked Fifth Amendment protections); Brooks v. Tennessee, 406 U.S. 605,610-611 (1972) (rule requiring that defendant be first in order of defense witnesses '"cuts down on the privilege [to remain silent] by making its assertion costly."')

The Fifth Amendment protects the accused from "being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. . . ." Schmerber v. California, 384 U.S. 757, 761 (1966)

That a written report constitutes evidence of a communicative nature was recognized by this Court as long ago as the last century when the Court stated that ". . . we have been unable to perceive that the seizure of a man's private books and papers to be used against him is substantially different from compelling him to be a witness against himself." Boyd v. United States, 116 U.S. 616, 633 (1886).

The government suggests that the privilege adheres only to the defendant and cannot include documents in the investigator's possession. [Petition at 17, 18] However, the fact that the reports are those of the investigator does not affect the protection afforded defendant Nobles. It has sometimes been stated that the documents sought must be held in a personal capacity by the individual exercising the right. See United States v. White, 322 U.S. 694 (1944). This qualification prohibits a labor union representative from withholding papers because he held the papers which belonged to the union, not to him, in his capacity as an official of the union. Id. The present case is distinguishable. The fact that the investigator and not the defendant, himself, holds the documents makes no difference. The attorney is clearly the client's agent. United States v. Judson, 322 F.2d 460 (9th Cir. 1963) 8 J. Wigmore, Evidence, §§2270, 2307 (McNaughton Rev. 1961.) An attorney's investigator, while working on the client's case, is likewise the agent of the client. As such, he can assert the privilege against self-incrimination on behalf of the client.

To hold that a document is protected if obtained and held by the client himself or if transferred from the investigator to the client but not if held by the investigator or the attorney is unreasonable, and may impede the preparation of a case by the attorney because of his consequent inability to adequately familiarize himself with all the documents. Thus, if the investigator cannot assert the privilege if he had conducted the interview, the defendant without an attorney is granted protection not accorded the defendant represented by counsel. An "intolerable" tension is created when the defendant is placed in the position of choosing whether to forego the benefit of counsel in order to protect documents by asserting his Fifth Amendment privilege, or making his documents vulnerable to perusal by the prosecution in order to have the benefit of counsel. Simmons v. United States, 390 U.S. 377, 392 (1968). An option which exacts such a "penalty" upon the exercise of the privilege against self-incrimination violates the Fifth Amendment. Malloy v. Hogan, 378 U.S. 1 (1964); Griffin v. California, 380 U.S. 609 (1965); Spevack v. Klein, 385 U.S. 511 (1967).

The petitioner also asserts that the "privilege applies only to . . . some communicative act or writing of the defendant himself. . . ." (Petition at 17). However, as pointed out by the Court of Appeals for the District of Columbia, "This line of analysis . . . is plainly inconsistent with the rationale of the privilege." United States v. Wright, at 1193, n.15.

If the defendant took witnesses' statements on his own, he could not be compelled to produce them as long as they were in his rightful possession. The person asserting the privilege does not have to have actual ownership.

/

Rightful possession in a "personal capacity" is sufficient. United States v. White, 322 U.S. 694 (1944). M. Moore, "Criminal Discovery" 18 The Hastings Law Journal, 865, 907 (1968). The testimonial disclosure implicit in documents which do not include a defendant's statements is the "witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded. . . ." 8 J. Wigmore, Evidence §2263 at 379 - 80 (McNaughton Rev. 1961).

This court has defined one of the underlying policies of the privilege as "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt. . . ." Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (1964). He faces this trilemma whenever the government forces the defendant to produce a document regardless of whether the document contains his statements or the statements of other witnesses. 8/

8/ "He can produce the sought after document, thereby implicitly stating that the document produced is the one requested, and provide evidence against himself. He can perjure himself in two ways: he can refuse production on the ground that he does not have the requested item, or he can produce something other than the document requested - for example, a forged non-incriminating version of the document. Or he can simply refuse production and subject himself to a contempt sanction. Compelled production of a document in the possession of the defendant, whether or not it is a document written by the defendant, thus involves a "communicative act" by the defendant within the protection of the privilege. '[I]t is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental complusion which it is the purpose of the privilege to prohibit.' Couch v. United States, supra, 409 U.S. at 330 n. 12, 93 S.Ct. at 617, quoting United States v. Cohen. 9th Cir., 388 F.2d 464, 468 (1967)." United States v. Wright, 489 F.2d 1181, 1193 - 4, n. 15 (1973). (D. C. Cir. 1973).

United States v. Wright, 489 F.2d 1181, 1193 - 4 (1973); In Re Grant, 198 F.708, 709 (S.D.N.Y., 1912) (Hand, J.), aff'd., 227 U.S. 74 (1913).

The petitioner contends that the respondent waived his right to be free of self-incrimination following an election to place the investigator on the witness stand. However, the investigator did not take the stand as an impeaching witness. Therefore, the order covering his report was premature and any argument that he waived the privilege by taking the stand is misplaced.

The Supreme Court has held that the due process clause of the Fifth Amendment places a burden on the government to provide the defense with material favorable to it. Brady v. Maryland, 373 U.S. 83 (1963). The defense has no commensurate obligation, for the self-incrimination clasue of the Fifth Amendment shields the defense from providing information to the government which would aid its prosecution.

The privilege against self-incrimination extends not only to testimony which may be conclusive on the issue of guilt but applies broadly to information which might furnish "a link in the chain" against the accused. Hoffa v. United States, 385 U.S. 293, 304 n.7 (1966) Hoffman v. United States, 341 U.S. 479, 486 (1951).

The Supreme Court of California has explained, ". . . the principal element in determining whether a particular demand for discovery should be allowed is . . . whether disclosure thereof conceivable might lighten the prosecution's burden of proving its case in chief. . . ." Prudhomme v. Superior Court of Los Angeles County, 2 Cal. 3d 320, 326, 85 Cal. Rptr. 129, 133 (1970). A defendant, in order to invoke the privilege, need make no showing that the

/

document sought is incriminating, "for the very fact that the prosecution seeks it establishes that in the prosecution's view, it may be incriminating." Jones v. Superior Court, 58 Cal. 2d 56, 60, 22 Cal. Rptr. 879, 881 (1962). See Miranda v. Arizona 384 U.S. 436, 460 (1966).

The petitioner's reliance on this Court's decision in Williams v. Florida is misplaced. That opinion upheld the validity of a state statute requiring the defense to give prior notice to the prosecution of defendant's intention to present an alibi and upon motion by the government, to reveal the names of the alibi witnesses. Williams v. Florida, 399 U.S. 78, 82 (1970).

The statute did not require that the alibi witnesses surrender memoranda written in connection with the events, much less force them to disclose internal defense reports. 9/

The alibi statute affects only the timing of the disclosure of evidence which the defense would ultimately present since the fact that the defense relies on an alibi and the names of witnesses would be revealed during the defense case. In this case,however, the government sought portions of a confidential report from an investigator to an attorney which the defense never intended to introduce into evidence.

This case does not present the issue as did Williams as to whether there would be ". . . self-incrimination problems if . . . the state was permitted to . . . take the deposition of the witness and find rebuttal evidence." Id. at 85.

9/ The rulemakers have specifically prohibited discovery of reports of interviews by defense investigators of government witnesses, Rule 16(c), Federal Rules of Criminal Procedure, see part 2, supra. Thus, instead of acceeding to the judgment of rulemakers as this court did in Williams, the trial court, in the instant case, took a position directly contrary to that of the rulemakers. It should be noted that proposed Rule 16 provides for the disclosure of alibi witnesses but continues to specifically prohibit discovery of the reports focused on in this case.

The defense offered no objection to the government presenting rebuttal evidence such as the testimony of the government witness the defense sought to impeach or the testimony of other witnesses who may have been present at the interviews. Neither did the defense ever object to revealing the name of its impeaching witness, John Bond, or to a government interview of him.

Thus, the holding in Williams offers no support for the unusual order of the trial court. Furthermore, the policy reason, avoidance of undue surprise, which justified discovery of the alibi defense and the names of alibi witnesses in Williams is simply inapplicable in the impeachment situation.

First, the defense never knows whether it will call impeaching witnesses until the government witness takes the stand at trial and testifies in a manner which is inconsistent with his prior statements. Second, the benefit to the government derived from an opportunity to investigate an alibi defense is not ordinarily a valid consideration when dealing with impeachment testimony. Such evidence is not susceptible to the kind of on-the-scene investigation which law enforcement officers often conduct when confronted with the contention that defendant was at another place when the crime occurred.

The serious potential danger lies in the fact that if impeachment of a defense witness is to be permitted by use of an internal defense memorandum, clearly courts are going to order, at the least, that defense counsel produce material in the memorandum "relating" to the statement sought to be impeached. Then, information not previously known to the government, helpful to it and arguably inappropriate for impeachment, would be revealed and could be used by the government in cross-examination, in rebuttal, or at a new trial. 10/

10/ The problem is not solved by permitting in camera examination by the court. Neither the prosecuting attorney nor the presiding judge should be permitted to peruse sections of internal defense files.

FYI-Sandstone
8-1-74 - 1003 - 1073

The government's proposal is seductive, but "[T]hose who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.' Boyd v. United States, 116 U.S. 616, 635 (1886)." Miranda v. Arizona, 384 U.S. 436, 459 (1966).

As a result, they made the privilege "as broad as the mischief against which it seeks to guard." Id, at 459-60. The Court of Appeals correctly recognized that the entire investigator's report fell within that privilege.

4. Court's Order Improperly Impinged Upon Confidentiality Of Communication Among Members Of Defense Team

The ability of a defendant to establish his innocence is severely eroded if the results of the investigation and preparation of his case are disseminated to the government. The rulemakers and the courts have seen fit to draw a cloak around the defense team to protect its investigative efforts. This cloak takes form variously as an obligation on the defense team not to reveal confidential material without the express consent of the defendant, restrictions on court ordered disclosure, and a prohibition against governmental intrustion into the defense camp. Contrary to petitioner's assertion that the Court of Appeals' opinion conflicts with the "philosophy of prior decisions of this court", the opinion reflects the increasing concern of the law with the sanctity of defense communications.

The attorney-client privilege traditionally has placed an obligation on members of the defense team to refrain from

FYI-Sandstone
8-1-74 - 1003 - 1073

revealing confidential communications of the client made in connection with the case. The Court of Appeals noted that the scope of the privilege has been extended in Rule 503 of the Proposed Rules of Evidence promulgated by the Supreme Court to arguably include a "communication as existed between the investigator and counsel for the defense." 11/ [App.A,infra, at page 8A]

In addition, the American Bar Association has urged that in some instances an attorney should not reveal communications from third parties. 12/

This Court has approved the judicially created work product doctrine. Hickman v. Taylor, 329 U.S. 495 (1947). Its scope encompasses investigative reports to an attorney in a criminal case. 13/ See discussion at Note 5 , supra.

11/ Rule 503(b) provides that a client has a privilege to prevent disclosure of confidential communications made during the preparation of his case "(2) between his lawyer and the lawyer's representative. . . ." 56 F.R.D. 183, 236 (1972). Although the tentative draft of the House version contains only a general rule, the rule permits the promulgation of regulations by the Supreme Court pursuant to its statutory authority. U.S.L.W. Supplement, p. 6, July 17, 1973.

12/ "To hold that an attorney should reveal confidential information which he has obtained, by virtue of his professional employment, from members of the family of a criminal would prevent such frank disclosure as might be necessary to a proper protection of the client's interest." Formal Opinion No. 23, ABA Committee on Professional Ethics. (January 24, 1930)

13/ "Similarly . . . the doctrine of Hickman v. Taylor exempts from discovery certain 'work product' of the attorney: including records of communications to him from third persons not within the attorney-client privilege". Annotation, Development, since Hickman v. Taylor, of Attorney's Work Product Doctrine", 35 ALR 3d 412

FYI-Sandstone
5-1-74—100M—1073

The Sixth Amendment's guarantee of counsel also serves to ensure privacy during defense preparations of a case.14/ As a result, the protections which modified attorney-client privileges and the work product doctrine afford, are subsumed by the cloak in which the constitutional right to effective assistance of counsel surrounds a defendant in a criminal case.

A defendant is entitled to the effective assistance of counsel "at every step in the proceedings against him." Powell v. Alabama, 399 U. S. 1, 7 (1970); Glasser v. United States, 315 U. S. 60, 76 (1942). Included in the concept of effective assistance of counsel is the presumption that counsel will investigate a case thoroughly and will interview witnesses. See Powell v. Alabama, supra, at 58; Griffin v. Illinois, 351 U. S. 12 (1956); United States v. Germany, 32 F.R.D. 421 (M.D. Ala. 1963); ABA Standards, Providing Defense Services § 1.5 (Approved Draft, 1968); The Defense Functions §.1 (Approved Draft, 1971).

Clearly the defense attorney, to carry out his obligations, must work with assistants such as secretaries and investigators. These individuals become part of the defense team and agents of the attorney and the defendant. The members of the defense team must be able to communicate with each other. Considerations of efficiency and accuracy demand that certain of these communications be in writing. Thus, an investigator implements the defense team's obligation to interview witnesses by speaking with the witness, and writing a report to the attorney setting forth the content and his impressions, of the discussions.

Sixth Amendment considerations are involved in at least two distinct ways. First, the government, by securing

14/ See Memorandum of the District of Columbia Public Defender Service filed in connection with United States v. Wright, supra.

FYI-Sandstone
5-1-74—100M—1073

an order forcing the defendant to provide it with portions of the report, improperly intrudes upon the defense communication system. In terms of the effective assistance of counsel, it makes absolutely no difference whether the conversation is between the attorney and his client, or between the attorney and his agents, or between a member of the defense team and witnesses. See Hoffa v. United States, 385 U.S. 293, 305-7 (1966).

This court has condemned the government's invasion of a defense camp by means of an informer who observed interviews between the attorney and several defense witnesses. In Hoffa v. United States, supra, the court stated that the defendant would have been entitled to a new trial if he had been convicted, since, ". . . a surreptitious invasion by a government agent into the legal camp of the defense may violate the protection of the Sixth Amendment. . . ." Id. at 306. See Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953); Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951); In Re Terkeltaub, 256 F.Supp. 683 (S.D.N.Y. 1966).

Disclosure of portions of the defense report places the government in the camp of the defense with ears to listen to the interview of the witness by the investigator, and eyes to read portions of the confidential report the investigator wrote the attorney.

A second Sixth Amendment consideration is the chilling effect that disclosure of such reports would have on a defense team, and the consequent ineffectiveness of counsel that would result. Investigators would cease writing reports. Then, as this court recognized in the context of work product, inefficiency and inaccuracy would inevitably develop in the ". . . preparation of cases for trial", Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). "The effect

on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." Id.

The Sixth Amendment's concern for effective communication between members of the defense team was recognized in United States v. Venuto, 182 F.2d 519 (3d Cir. 1950). The court in that case held that the defendant was denied the right to counsel when the court ordered the defendant and his attorney not to speak to each other during an eighteen hour recess in the midst of defendant's testimony at trial. Id. at 522.

The trial court's order in the instant case, by permitting government incursion into the defense camp when an investigator writes a report and at trial impeaches a witness, places an impediment in the way of effective defense communications, potentially as serious as an order that counsel and defendant not confer with each other during a particular recess.

Such an impediment improperly exacts a price for the exercise of rights of constitutional stature. See Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

BEST COPY AVAILABLE

5. The Court's Order Forbidding John Bond From Testifying As To Prior Inconsistent Statements Of Government Witnesses Denied Defendant The Right Of Cross-Examination

The Sixth Amendment forbade the trial court from enforcing its discovery rule against respondent who refused to comply, by excluding relevant, probative evidence. The right to cross-examine witnesses is guaranteed by the confrontation clause of the Sixth Amendment and has been labeled as a "fundamental right", essential to a fair trial. Pointer v. Texas, 380 U.S. 400, 403 (1965); See Bruton v. United States, 391 U.S. 123 (1968). The court stated in Kirby v. United States, 174 U.S. 47, 55, 56 (1899), that the right of confrontation is "[o]ne of the fundamental guarantees of life and liberty," and "a right long deemed so essential for the protection of life and liberty that it is guarded against legislative and judicial action by provisions in the constitution. . ." An integral part of cross-examination is the opportunity of the cross-examiner to impeach the credibility of a witness. As the Supreme Court has stated, ". . . certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. Pointer v. Texas, 380 U.S. 400, 403 (1965).

Impeachment by showing prior inconsistent statements or prior statements revealing bias or prejudice involves the use of an impeaching witness. The cross-examination of a witness is effectively denied a defendant when he is unable to introduce testimony that the witness made a prior

inconsistent statement or a statement showing bias or prejudice. No comparable constitutional right is involved in the government's examination of a defense witness, such as John Bond. This Court has stated that:

> ". . . [C]ross examination of a witness is a matter of right . . . . Its permissible purpose, among others, are . . . that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue and biased. . . .
>
> * * * *
>
> ". . . Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . ." Alford v. United States, 282 U.S. 687, 691, 692 (1931).

Respondent Nobles was denied the opportunity to put the weight of the testimony of Van Gemeren and Hoffman and their credibility to a test, and to permit the jury to fairly appraise them, when the court ordered that John Bond not testify to the statements given him in interviews with Hoffman and Van Gemeren.

6. Any One Of Three Additional Issues Raised By The Respondent In His Brief Before The Court Of Appeals Warranted Reversal Of The Conviction Of Mr. Nobles, And Justifies Denial Of The Petition For Writ Of Certiorari.

a. The Misconduct Of The Prosecutor Denied Defendant Due Process Of Law Guaranteed By The Fifth Amendment.

Although the Court of Appeals stated that the conduct of the prosecutor did not require reversal, respondent respectfully submits that his flagrant misconduct justifies denial by this Court of the Petition for Writ of Certiorari, since it constitutes a separate grounds justifying reversal of the conviction in United States v. Nobles.

During the trial, the prosecutor improperly interrupted defense counsel's questioning of government witnesses to misstate and repeat prior testimony of the witnesses in the presence of the jury.

For example, Van Gemeren testified that he saw the side and back of the man under the surveillance camera. [R.T. 89] He also testified that he could not recall whether the man under the surveillance camera was facing towards him or away from him but "thought" that he could see a side view for half a minute. He admitted that the man's back was toward him "most of the time." [R.T. 38-39]

Despite this testimony, the prosecutor rose to his feet to make an objection to defense counsel's cross-examination and stated in the presence of the jury, "This witness has testified as to the fact that he observed this person's face, that he then turned toward the bank manager, he saw him from the side and from the front." [R.T. 67] In fact, Van Gemeren

never testified that he had seen the man "from the front" or that he observed his "face".

During the cross-examination of Hoffman, defense counsel attempted to establish that Hoffman did not see a front view of the man alleged to be Nobles. Hoffman testified, "he would have been generally facing toward the teller area, and then occasionally shifting to his right. . . ." [R.T. 351] The teller area was directly opposite the side of the bank where Hoffman and Nobles were alleged to have been standing. The next question was interrupted by the prosecutor who stated, "He said he faced both ways, toward the witness and toward the tellers' area." [R.T. 352] In fact, Hoffman never testified that the man faced towards him.

During closing argument, the prosecutor made a number of misstatements which severely prejudiced respondent. He said that the lineup which Hoffman attended and from which he picked out Mr. Nobles, occurred 16 days after the robbery. [R.T. 676-77] In fact, the lineup occurred over seven weeks after the robbery. The misstatement struck at the essence of the defense theory that a substantial length of time between the robbery and the lineup made the identifications suspect. [R.T. 401, 404, 710, 711]. The prosecutor also stated that Mr. Hoffman testified that a struggle involving a witness and Mr. Nobles made him particularly aware of Nobles. [R.T. 676] In fact, Mr. Hoffman did not so testify [See R.T. 328]. In addition, the prosecutor's statement that the testimony that Robert Nobles was under the surveillance camera was "uncontradicted" not only misrepresented the evidence but constituted an improper comment on defendant's right not to testify. [R.T. 162-63, 194, 563, 740].

The prosecutor also improperly intimated that an independent determination of defendant's guilt had been made

prior to trial, and improperly expressed a personal opinion as to the honesty of government witnesses. [R.T. 737-8, 742, 747]. In addition, the prosecutor improperly stated that the government possibly could have brought ten more witnesses into the courtroom who would have identified Mr. Nobles, thereby denying defendant the right of confrontation of those witnesses. Finally, the prosecutor improperly and prejudicially stated on four occasions that Mr. Nobles' alibi witness worked as a nude dancer, and also stated that she was "shacking up" with defendant Nobles.

This Court's statement in Berger v. United States, 295 U.S. 78 (1935) is applicable to this case:

> "[We] have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance of, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

FPI-Gandstone
5-1-74—1002d - 1073

b. Admission Into Evidence Of Statement Taken In Violation Of Miranda v. Arizona Constituted Reversible Error.

The Court of Appeals did not comment on defendant's contention that the admission of Robert Nobles' statement violated the provisions of Miranda v. Arizona. Robert Nobles in response to a question by officers after his arrest, and before Miranda warnings were given, denied that he was Robert Nobles.

The admission of this statement constitutes a separate grounds justifying the reversal of defendant Nobles' conviction and the denial of the petition.

c. The Trial Court Erred In Refusing To Permit Testimony Of Defendant Nobles' Expert On Eyewitness Identification.

The Court of Appeals found no error in the trial court's refusal to permit the testimony of a defense expert on eyewitness identification. App. A, infra, at page 8A. Respondent urges that the trial court's decision was erroneous and constitutes a separate grounds justifying the reversal of defendant Nobles' conviction and the denial of the petition.

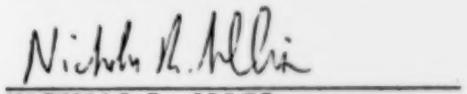
FPI-Gandstone
5-1-74—1003M—1073

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP
Federal Public Defender



NICHOLAS R. ALLIS
Deputy Federal Public Defender

Rm 707, United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-4796

Counsel for Respondent

DATED: December 24, 1974

FPI-Sandstone
5-1-74—100M—1073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. ____

UNITED STATES OF AMERICA, Petitioner

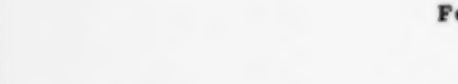
v.

ROBERT LEE NOBLES, Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, 1974, a copy of Motion for Leave to Proceed In Forma Pauperis, Affidavit and Brief Opposing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, were air mailed postage prepaid, and special delivery, to the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, counsel for the Petitioner.

JOHN K. VAN DE KAMP
Federal Public Defender



NICHOLAS R. ALLIS
Deputy Federal Public Defender

Rm 707, United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-4796

Counsel for Respondent

FPI-Sandstone
5-1-74—100M—1073

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. TOMMIE LOUIS BROWN, *Defendant-Appellant.*	No. 73-2279
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. VIRGIL DAVID SWAIN, *Defendant-Appellant.*	No. 73-2678
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ROBERT LEE NOBLES, *Defendant-Appellant.*	No. 73-2280

[June 10, 1974]

Appeal from the United States District Court
for the Central District of California

Before: ELY and KILKENNY, Circuit Judges, and
ENRIGHT, District Judge*

ENRIGHT, District Judge:

In late morning on February 6, 1973, four men robbed a Crocker National Bank in Los Angeles. Three men were brought to trial in April, 1973, for the offense: defendants Tommie Louis

*The Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX "A"

BEST COPY AVAILABLE

Brown, Robert Lee Nobles, and Virgil David Swain. The fourth man, whose name appeared on the indictment as Jonathan Ray Nobles, was a fugitive at time of trial.

The government's theory was that Brown jumped behind the tellers' windows and moved down the line of cages, collecting money from the cash drawers, while the other three guarded the customers and personnel from various positions. A surveillance camera took pictures of all the participants except the one who stood beneath the camera, allegedly defendant Nobles [hereinafter Nobles].

I *The Brown and Swain Appeals*

The evidence against Brown and Swain was similar and consisted of surveillance photographs, items taken from the apartment they shared, a comparison of photographs, eyewitness identifications, and a statement by Brown.

Defendants Brown and Swain primarily attack the comparison of certain photographs. One group of photographs consisting of enlarged surveillance pictures showing the faces and clothing of the two robbers alleged to be Brown and Swain, were placed on a chart next to a second group of photographs consisting of enlarged police pictures of Brown and Swain as well as FBI photographs of the items of clothing seized from their apartment. An FBI expert in photographic identification, Frederick E. Webb, compared the two groups of photographs and stated that the faces in the police photographs were the same faces as those in the surveillance photographs. He also testified that the clothing in the two groups of photographs was the same, and further, he made a similar analysis of a surveillance photograph of a pistol used in the robbery and a FBI photograph of the handgun seized in the apartment.

When Mr. Webb, in response to the prosecutor's questions, began to state his opinion that Brown and Swain were indeed two of the three pictured on the surveillance film, the district court overruled the defense objection but not without some misgiving:

> I must say in my own personal opinion it comes very, very close to impinging upon the province of the jury . . . . that case [*United States v. Cairns*, 434 F.2d 643 (9th Cir.

1970)] I suggest to you, Mrs. Broady, which seems to authorize this very procedure.

Reporter's Transcript [hereinafter R.T.] 260, lines 5-11. We too are troubled by the proffered testimony.

In *Cairns*, this circuit previously wrote:

> Appellant next contends that over his objection on the ground the testimony would invade the province of the jury, Government's witness, a special agent with the Federal Bureau of Investigation and photographic identification specialist, compared two photographs: a photograph taken by the bank's surveillance camera at the time of the robbery and a police photograph of appellant taken ten days prior to trial. To assist in his identification, he enlarged the head area of the surveillance photograph to the same size as the enlarged head area in the police photograph. The witness then pointed out the similarity in the two photographs in the nose and mouth areas, chin line, hair lines, ear contours and inner folds of the ears, among other things. He then testified that based on all the general characteristics the individual in the surveillance photograph is the individual in the police photograph "or another individual having all of these characteristics as to nose, mouth, chin, and the ear characteristics . . . . "We see no error in the admission of this testimony. While the jury is the sole judge of the facts, expert testimony has long been admissible as an aid to the jury.
>
> 434 F.2d at 644.

That concluding statement is undisputed. But whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952).

Advisory Committee's Note to Proposed Federal Rule of Evidence 702, Court Version, 56 F.R.D. 183, 282 (1972). To permit an expert to testify as to his opinion of parentage based on the resemblance of a child to a reputed father in a paternity suit would be grossly inappropriate by the above standard. But just as surely, fingerprint identification, the comprehensive examination of aerial photographs, and other similar scientific and technical evaluations, are obviously within the realm of permissible expert testimony. Testimony as to whether a particular individual is portrayed in a photograph rests on some middle ground. Since the Cairns decision relied solely upon traditional expertise fields, we feel it incumbent upon ourselves to reexamine the issue faced in *Cairns*.

We have requested and reviewed the briefs submitted in *Cairns*. Such review allows us to conclude that the two cases—*Cairns* and the instant one—are distinguishable.

In the instant case, Webb's testimony was general. In reference to the photographs of Brown, he stated broad conclusions: "rather thin-faced," "somewhat elongated," "[t]he mustache is similar, the shape of the nose, the eyes, the eyebrows, ..." R.T. 260, lines 22-24. In *Cairns*, however, the testimony was of greater detail. Not only did the agent compare general contours and shapes but also found ear and lobe formations particularly significant and termed a particular facial crease as "distinctive" and "unusual." Government's Brief, *United States v. Cairns*, p. 5. In its argument to this court in *Cairns*, the government also emphasized the detail of the agent's testimony, for example, his comparison of a nipple in the center of the defendant's ear. *Id.* at 6.

We would hold that *Cairns* should be limited to the precision as argued in its briefs; therefore, when a party seeks to introduce expert testimony on personal photographic identification—whether to prove *or* disprove similarity, he should first be required to make an offer of proof to the court outside the presence of the jury.

After the elicitation of what facts the expert has depended upon in reaching his conclusions, the court should determine whether it has been convinced by a preponderance that the facts offered are beyond the jury's common experience. Of course, the

court in reaching its determination must take into consideration that the party desiring admission may be free to argue his position without the benefit of expert testimony. If the court in its discretion, which may not be disturbed absent clear abuse, is convinced that the expert may materially assist the jury beyond their common experience as amplified by argument of counsel, the expert should be allowed to testify.

The same general test should be applied to the photographic identification and comparison of inanimate objects. The trial courts, however, should be cognizant that while the everyday experiences of twelve laymen over their combined lifetimes may permit them to make photographic comparisons of persons, they may utterly lack experience to distinguish or recognize certain objects such as firearms. In the facts of this particular case, we would hold the admission of the expert's opinion on the personal identification of Brown and Swain to have been error,[1] but his testimony concerning the items seized to have been properly admitted. We cannot conclude, however, that the error was prejudicial. Disregarding the agent's opinion as to their identity, the evidence against Brown and Swain—the eyewitness testimony, the discovery of the items—was overhelming, rendering the error harmless.

[1]The photographs introduced in this case afford a spectrum for aiding a trial court in determining when expert testimony may be permitted. There can be no reasonable doubt that the pictures of the robber who moved from cage to cage was indeed defendant Brown. The resolution of the camera is clear; his likeness unmistakable. Testimony of an expert would be of no useful purpose and hence error, but presumably, harmless.

The pictures of the man who stood to the rear of the bank are of poor resolution and quality. The only articulable characteristics concerning which the expert could testify were generalities, *e.g.*, facial contours, shape of sideburns. This foundation would be inadequate, and expert testimony would be error, perhaps prejudicial, depending upon the state of other evidence.

The third pictured individual was the fugitive, allegedly Jonathan Nobles, brother of defendant Nobles. The resolution of the surveillance pictures is clear, but the conclusion that the individual is Jonathan Nobles after comparison with a known photograph of Jonathan Nobles is not entirely free of doubt. An expert, in our opinion, could be useful. Of course, the discretion would lie with the trial court.

II *Nobles Appeal*

The evidence against Nobles differs from the case against Brown and Swain. Most obvious is the absence of surveillance photographs, for Nobles is alleged to have been the robber who stood underneath the camera rather than within its scope. Second, no objects were found to connect him to the offense in contrast to the items seized at the apartment of Brown and Swain. Finally, the eyewitness testimony was far less impressive against Nobles than against Brown and Swain.

A bookkeeper at the bank identified Brown and Swain in court as well as the items of clothing. He could not identify Nobles. Similarly, the assistant branch manager identified Brown and Swain in court but could not identify Nobles.

A bank teller, Peter van Gemeren, identified Brown in court. He did identify Nobles but his testimony was subjected to extensive cross-examination. Likewise, Gary Hoffman, a salesman visiting the bank, pointed out the men alleged to be Brown and Swain on the surveillance photographs and described their activities; he too identified Nobles as having stood by the business counter. Defense also subjected Hoffman to arduous cross-examination.

Although Nobles presented an affirmative alibi defense, his strongest attack was to discredit the key evidence against him: the eyewitness identification by Van Gemeren and Hoffman. To do so, his counsel not only employed cross-examination but also attempted to introduce expert opinion testimony on the frailties of eyewitness examination in general and to impeach the specific eyewitnesses by statements made by them to his investigator.

A. *Expertise on Eyewitness Identification*

Nobles offered the testimony of Dr. Robert Buckhout as an expert witness to describe the problems of eyewitness identification in general and the specific difficulties with the identifications in this case. The court refused the proffered testimony, concluding that the testimony would invade the province of the jury, that the undue consumption of time would substantially outweigh its probative value, and that the offer of proof was inadequate. We in turn cannot conclude that the trial court was in error. *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973).

BEST COPY AVAILABLE

B. *Impeachment*

During the defense case, counsel sought to introduce the testimony of John Bond, chief investigator for the Federal Public Defenders. Mr. Bond had interviewed the witnesses Van Gemeren and Hoffman. On cross-examination Van Gemeren had testified that he did not recall telling Bond that he had seen only the back of the bank robber beneath the camera; Hoffman, during cross-examination, had denied telling Bond that all blacks look alike. Defense counsel's offer of proof was that Mr. Bond would testify that Hoffman had told him that "all blacks look alike" and that Van Gemeren had told him that "as far as the man at the surveillance camera is concerned, he [Van Gemeren] only saw the back of that man." Eventually, the court ordered that impeachment of the witnesses by Bond through these statements would be conditioned upon the defense agreeing to render to the government upon completion of the investigator's testimony the alleged statements as contained in the investigator's report. Rather than submit to this condition, defense counsel chose to forego impeachment, preferring to stand upon his client's right against self-incrimination as well as the protection of a work product rule.

For the reasons stated below, we would hold that, despite the very limited and seemingly judicious restriction on the defense, conditioning impeachment with prosecutorial discovery was prejudicial error. Admittedly, the order was narrowly drawn. But to single out any one witness and require as a condition precedent that his previous statement be produced is inappropriate. The defendant must have the essential right to call an impeaching witness; he need not corroborate the credibility of that witness before calling him to the stand, *i.e.*, by producing a prior recorded or transcribed statement. Were it otherwise, we would fear that such requested discovery would become a matter of routine, a result we desire to avoid.

Although defense counsel did not argue that the condition impinged on the attorney-client privilege, we deem it appropriate to comment on the relevance of that privilege.

The proposed Rules of Evidence as tentatively promulgated by the Supreme Court [hereinafter Court version] included Rule

503, Lawyer-Client Privilege. 56 F.R.D. 183, 235-240 (1972). That rule in pertinent part states:

> (a)(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
>
> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional services to the client, ... , (2) between his lawyer and the lawyers representative, ...

Id. at 236. In contrast, the tentative draft of H.R. 5463, 93rd Cong., 1st sess., as amended by the Subcommittee on Criminal Justice, House Committee on the Judiciary [hereinafter House version], contains no specific privilege rules. The House version would promulgate only a general rule, Rule 501, which provides that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience . . . ." U.S.L.W., Supplement, p. 6, July 17, 1973. The rule does, however, further provide that the Supreme Court may prescribe rules pursuant to statutory authority. Thus, the Supreme Court may some day prescribe rules such as Rule 503 of its version, the literal meaning of which may arguably serve to protect a communication as existed between the investigator and counsel for the defense.

But absent any prescribed rules, common law dictates the federal rules of evidence, and the common law does not protect communications from third persons:

> Since the privilege is designed to secure subjective freedom of mind for the client in seeking legal advice . . . , it has no concern with other persons' freedom of mind nor with the attorney's own desire for secrecy in conduct of a client's case. It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client nor that it came from some particular *third person* for the benefit of the client.

BEST COPY AVAILABLE

8 Wigmore, Evidence (McNaughton rev. 1961), § 2317(2) (emphasis original).

Defense counsel did strongly assert that to condition impeachment in the manner ordered could infringe upon his client's right against self-incrimination. This problem is indeed troubling.

When Federal Rule of Criminal Procedure 16 was amended in 1966, Justices Black and Douglas dissented. Justice Black wrote: "I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all unconstitutional. . . . And I agree with my Brother DOUGLAS that some of the proposed criminal rules go to the very border line if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself." 39 F.R.D. 252, 272 (1966). And Justice Douglas stated:

> The extent to which a court may compel the defendant to disclose information or evidence pertaining to his case without infringing the privilege against self-incrimination is a source of current controversy among judges, prosecutors, defense lawyers, and other legal commentators. A distinguished state court has concluded—although not without a strong dissent—that the privilege is not violated by discovery of the names of expert medical witness whose appearance at trial is contemplated by the defense. I mean to imply no views on the point, except to note that a serious constitutional question lurks here.
>
> The prosecution's opportunity to discover evidence in the possession of the defense is somewhat limited in the proposal with which we deal in that it is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation if conditioned on the defendant's exercise of the opportunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights? See, *e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 403-406, 83 S.Ct. 1790, 1793-1795, 10 L.Ed.2d 965. To deny a defendant the opportunity to discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the

9A

> defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege.

39 F.R.D. at 277 (footnote omitted).

The "distinguished state court" decision, referenced in the omitted footnote, is *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). In *Jones*, the defendant charged with rape requested a continuance of trial, alleging that he had been impotent for a long time, and the continuance was necessary to gather essential medical evidence. The prosecution responded with a motion for discovery of witnesses, reports, and data concerning the alleged impotence. In holding that the prosecutorial discovery was proper, the California Supreme Court concluded that "since the criminal discovery permitted to the defendant is the result not of a constitutional mandate of due process but rather of the desire to promote orderly ascertainment of truth [discovery] should not be a 'one-way' street." G. Lapides, *Cross-Currents in Prosecutorial Discovery: A Defense Counsel's Viewpoint*, 7 U.S.F.L.Rev. 217, 219 (1973), citing *Jones v. Superior Court*, 58 Cal. 2d at 59-60.

More recently, however, the California Supreme Court has virtually limited *Jones* to its facts. In *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970), the court wrote:

> Our decision in *Jones* was based primarily upon our conviction that since discovery is a valuable tool for ascertaining the truth, it should be conducted along a "two-way street" in criminal as well as civil proceedings, to the extent permitted by constitutional principles. We readily acknowledge that *pretrial* disclosure would greatly facilitate the administration of criminal justice by minimizing the element of surprise, avoiding unnecessary delays and continuances, reducing inconvenience to the court, counsel, jurors and witnesses, and permitting more effective *pretrial* preparation. However, certain significant developments in the law since *Jones* was decided in 1962 caution us not to extend its holding beyond its facts without careful consideration of the possible effects which such an extension could have upon the accused's rights

10A

and privileges, and especially his fundamental right not to be compelled to be a witness against himself.

. . .

We had occasion, in *People v. Schader*, 71 Cal.2d 761, 770 [80 Cal. Rptr. 1, 457 P.2d 841], to analyze the policy which underlies the privilege against self-incrimination and recognized, ". . . with the United States Supreme Court, 'that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against the accused out of his own mouth.' (*Malloy v. Hogan* (1964) 378 U.S. 1, 7-8 . . . .) The People must 'shoulder the entire load' of their burden of proof in their *case in chief*, without assistance either from the defendant's silence or from his compelled testimony. [Citations]." (See also *Murphy v. Waterfront Com. of N.Y. Harbor*, 378 U.S. 52, 55 [12 L.Ed.2d 678, 681-682, 84 S.Ct. 1594].)

. . .

Thus, if we analyze *Jones* in the light of the policy considerations discussed in *Schader*, it is apparent that the principal element in determining whether a particular demand for discovery should be allowed is not simply whether the information sought pertains to an "affirmative defense," or whether defendant intends to introduce or rely upon the evidence at trial, but whether disclosure thereof conceivably might lighten the prosecution's burden of proving its *case in chief*. Although the prosecution should not be completely barred from *pretrial* discovery, defendant must be given the same right as an ordinary witness to show that disclosure of particular information could incriminate him.

An ordinary witness need not actually prove the existence of an incriminatory hazard as that would surrender the very protection which the privilege against self-incrimination was designed to guarantee. Instead, the privilege forbids compelled disclosures which could serve as a "link in a chain" of evidence tending to establish guilt of a criminal offense; in ruling upon a claim of privilege, the trial court must find that it clearly appears from a consideration of all the circumstances in the case that an answer to the challenged question cannot possibly have a tendency to incriminate the witness.

Id. at 323, 325, 326, 466 P.2d at ___, 85 Cal. Rptr. at ___ (footnotes and citations omitted; emphasis supplied).

The California Supreme Court is not alone in this respect. In *United States v. Fratello*, 44 F.R.D. 444, 449, 451 (S.D.N.Y. 1968), Judge Pollack concluded:

> If, therefore, the items sought from the defendants are of a class of evidence which would ordinarily be privileged from disclosure under the Fifth Amendment, the defendants ought not be required to disclose them prior to the establishment on trial of the government's *prima facie* case.
>
> . . .
>
> Until appellate guidance appears which indicates that, in the absence of special circumstances, the price sought by the prosecution for *pre-trial* disclosure of its records is not to be treated as an encroachment on the privilege, this Court is not prepared to condition discovery by the defendant under Rule 16(b) on *pre-trial* disclosure of privileged records in the possession or control of the defendant. In this connection it is noted that Courts usually accept the defendant's view of what records may be self-incriminatory.

Citations omitted; emphasis supplied.

Yet, *Prudhomme* and *Fratello* dealt with pretrial prosecutorial discovery as well as the constitutional concerns of conditioning defense discovery upon the possibility of enhancing the government's case in chief. In the instant case, of course, the discovery would have been during trial and useful only in rebuttal. Then, too, both *Prudhomme* and *Fratello* preceded *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), which upheld the constitutionality of a state's notice of alibi statute in the face of fifth amendment assault. We would, nevertheless, conclude that the fifth amendment remains relevant in the instant circumstances.

In *United States v. Wright*, 489 F.2d 1181 (D.C. Cir. 1973), the Circuit for the District of Columbia faced an analogous situation. The appellant's court-appointed counsel had employed an investigator from the Public Defender Service. The investigator interviewed potential witnesses and sent to counsel a report con-

sisting of summaries of the interviews. At trial the court ordered the investigator who had testified in behalf of the defense to turn over a copy of the report to the government. True, the order was to forward the entire report rather than to specific, relevant portions as were ordered here, but potential incrimination exists in both circumstances.

The court concluded that the principle that criminal discovery must inevitably remain basically a one-way street is firmly imbedded in our common law tradition. *Id.* at 1192. As that circuit also noted,

> There has been some attempt in recent years to increase the Government's right to discovery in criminal cases—for example, through statutes requiring the defense to give pretrial notice of the names of witnesses to be called as part of an alibi defense. But as the Supreme Court has emphasized in holding such statutes constitutional under the Fifth Amendment, they only require the defense to turn over to the Government information which the *defense intends to reveal at trial. See* Williams v. Florida, 399 U.S. 78, 85, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).

Id. at 1194. (Emphasis added). In the instant case, the defense prior to the cross-examination of the government's witnesses surely could not have intended to reveal its own information when the witnesses may have admitted its import during cross-examination. And if the witnesses had admitted that they had made such statements as "all blacks look alike" or "I only saw him from the back" to the investigator, the government would have had the responsibility of resurrecting its witnesses' testimony by eliciting any rehabilitating statements by those same witnesses.[2]

[2]Enterprising counsel may arguably assert that the evidence doctrine of completeness, *e.g.*, Cal. Evid. Code § 356 and Proposed Federal Rules of Evidence, Court version 107, House version 106, would require disclosure. But as the comment to § 356 by the Assembly Committee on the Judiciary implies, the doctrine is not a discovery device, but rather, only permits certain relevant evidence to be admitted that would otherwise be inadmissible. The burden is on the adversary to "inquire," that is, cross-examine or rebut.

Since the Proposed Federal Rule may shift that burden, *i.e.*, the adversary may "require" admission of the entirety, it would conceivably

Since the witnesses, for whatever reasons, denied making the initial damaging statement, the defense had no alternative but to present its impeachment evidence, *i.e.*, Bond's testimony.[3] If the prosecutor doubted the validity of the contexts in which the purported statements were made as testified to by Bond, he surely had access to his own witnesses and by their testimony could have offered rebuttal to Bond's version. In summary, then, we agree with the Circuit for the District of Columbia that

> The defendant has a right under the Fifth Amendment to compel the state to investigate its own case, find its own evidence, and prove its own facts. The defense has no duty to help the prosecution convict the defendant. We therefore reject any rule which would require the defense to turn over to the prosecution prior statements of defense witnesses which could be used by the prosecution as evidence against the accused.

Id. at 1195. *See also People v. Bais*, 31 Cal. App. 3d 663 (1st Dist. 1973).

The *Wright* panel also examined that discovery order from the perspective of the Federal Rule of Criminal Procedure 16 and the Jencks Act, 18 U.S.C. § 3500,[4] as we must.

be utilized as a discovery tool. But the proposed rule only encompasses writings or recorded statements introduced into evidence, not the testimony of an individual, albeit that his recollection may be memorialized.

[3]That impeachment is the only alternative was not lost to the prosecutor. At the close of trial, he argued:

> Mr. MacIntyre: . . . Mr. Bond never testified in the trial as to anything Mr. Hoffman did or did not say to him.
>
> Mr. Hoffman, you heard his testimony, and I submit to you he denied the questions, said, "No," to the questions that were asked by Mr. Allis. If he testified any differently Mr. Bond would have testified in this courtroom to you as to what the inconsistencies were, and Mr. Bond did not so testify. You heard his testimony.

R.T. at 745, lines 6-14.

[4]The panel in *Wright* gave due consideration to the problem which could arise if a witness refreshed his recollection. (There is nothing in the record to suggest Bond used his reports to refresh his recollection.) That court considered it "hornbook rule of evidence that, had [the investigator] used parts of his report to refresh his recollection while

Before the promulgation of the original rules of criminal procedure, it was doubtful whether criminal discovery was permitted. In 1966, however, Rule 16 was liberalized toward greater discovery.

The pertinent portions of Rule 16 are as follows:

> (b) *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2) [examinations, tests, experiments], *this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government EXCEPT as provided in 18 U.S.C. § 3500.*
>
> (c) *Discovery by the Government.* If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photo-

on the witness stand, the prosecution would be entitled to examine those parts of the report and would be permitted to make use of those parts of the report in cross-examining [him]." 489 F.2d at 1188 (emphasis added). As noted by that panel, however, refreshing recollection *prior* to testifying may stand in different posture. *See* McGill v. United States, 270 F.2d 329, 331 (D.C. Cir. 1959); *see also*, Sullivan v. Superior Court, 29 Cal. App. 3d 64, 105 Cal. Rptr. 241 (1st Dist. 1972) [attorney-client privilege applicable when client previously refreshes recollection].

The Court version of Proposed Rule 612 generally permits an adversary to inspect, cross-examine from, and introduce portions of a writing used by a witness to refresh his recollection either *before or while* testifying. The House version has amended this by requiring the court in its discretion to determine that it be necessary in the interest of justice before a writing be divulged that has been used for prior refreshing of recollection.

> graph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, *this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.*

Emphasis and capitalization added.

Each subsection contains a work product[5] savings clause, *i.e.*, the italicized portions. But the government's work product is subject to an important exception, the Jencks Act, 18 U.S.C. § 3500, which provides in relevant part:

[5]To apply the work product rule to criminal law is not unusual:

> Although the . . . policies supporting protection of an attorney's work product [have been] stated with reference to civil litigation, they are even more strongly applicable in criminal proceedings. There is "an especially strong tendency toward the protection of materials as the 'work product' of an attorney in criminal cases. Thus, in relevant criminal cases (admittedly few), the courts have *consistently* held statements by witnesses . . . to be the 'work product' of an attorney." Annot., 35 A.L.R.3d 424 (1971) (footnotes omitted) (emphasis added). In State v. Montague, 101 N.J. Super. 483, 244 A.2d 699 (1968) the state sought access to the defendant's attorney's notes concerning interviews with prospective witnesses. The court states:
>
> > "[W]e are satisfied that the notes here in question represented the work product of defendant's attorney and, under the doctrine of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), production should not have been compelled. The fears therein expressed with regard to the inviolability of an attorney's thoughts and the possibility of inefficiency, unfairness and sharp practice are equally applicable to the setting of a criminal case." 244 A.2d at 702.
>
> In re Grand Jury Proceedings, Duffy v. United States, 473 F.2d 840, 846 (8th Cir. 1973).

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

. . .

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Thus, while Rule 16 is framed in terms of *pretrial* discovery, its inclusion of the Jencks Act leads us to conclude that Rule 16 has relevance to discovery *during* trial. And specifically, defense may discover, for purposes of impeachment, statements of government witnesses who have testified. *But* no such exception is included within the terms of subsection (e). We would conclude that the work product of defense is inviolable in these circumstances.[6] *See*

[6]We may note that new proposed amendments to the Federal Rules of Criminal Procedure are pending and will be effective August 1, 1974, unless sooner stayed by Congress. It must be noted that the proposed changes include the addition of Rule 12.1, Notice of Alibi, and 12.2, Notice of Defense Based Upon Mental Condition. Also, Rule 16 has undergone revision; of particular note is the revised Rule 16(b), Disclosure of Evidence by the Defendant:

(1) Information subject to disclosure.

(A) *Documents and tangible objects.* Upon request of the government, the defendant shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) *Reports of examinations and tests.* Upon request of the government, the defendant shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(C) *Defense witnesses.* Upon request of the government, the defendant shall furnish the government a list of the names and addresses of the witnesses he intends to call in the presentation of the case in chief. When a request for discovery of the names and addresses of witnesses has been made by the government, the defendant shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of Rule 15.

It must be emphasized, however, that Rule 16(b)(2), Information not subject to disclosure, retains the inviolability of internal defense documents.

also, United States v. Wright, 489 F.2d 1181, 1189-90 (D.C. Cir. 1973).

Finally, the court may make brief comment upon the alleged misconduct of the prosecutor. A review of the entire transcript permits us to conclude that the prosecutor's conduct does not require reversal. In fact, the record indicates that the trial judge conducted the case most properly, and the defendants received a fair trial.

Affirmed in part, reversed in part, remanded.

KILKENNY, Concurring and Dissenting:

BROWN AND SWAIN APPEALS

I concur in the affirmances of the Brown and Swain convictions, but not for the reasons stated by the majority. It is my considered judgment that the records on these appeals are free from error.

NOBLES' APPEAL

Turning now to the Nobles' appeal, I find myself in complete disagreement with the conclusions of the majority on the issue of impeachment by the defense witness, Bond.[1] To understand the issue, it is necessary to outline in detail the events leading up to the action of the trial judge.

On direct examination, the government witness Hoffman identified Nobles as the robber standing under the surveillance camera and also identified him from a photo spread and at a police line-up prior to trial. On cross-examination, Nobles' attorney asked Hoffman, "And isn't it a fact that you told Mr. Bond that to you all the blacks appear to be alike?" Hoffman responded, "I don't believe I indicated that to him." Continuing, the attorney inquired, "You do not recall stating that to Mr. Bond?" Hoffman replied, "No, I do not." Nobles' attorney repeated, "That all blacks look alike." Hoffman responded, "No, I do not, sir." At that time, in a bench conversation outside the presence of the jury, the prosecutor requested defense counsel to furnish a copy of "any interview, notes or recorded statements of Mr. Bond—in regard to a phone call.",[2] and noted "I notice he has a copy, and I would like to have a copy of that at this time before I am able to proceed with redirect examination of the witness." Defense counsel objected. The judge indicated sympathy with the government's view and asked defense counsel to furnish authority indicating that the government was not entitled to the memorandum. After defense counsel, for the second time, rejected the demand of the prosecutor to see the document, the judge conducted a hearing and held that the prosecutor was not entitled to see the investigator's memorandum until Bond took the witness stand and impeached Hoffman's testimony in connection with the memorandum,

[1]Chief Investigator, Federal Public Defenders Association.

[2]It is conceded that the conversation was by way of phone.

and then only to the extent that any and all statements of any defendant be excised prior to the delivery to the prosecutor.[3]

Later, defense counsel called Bond. The court inquired as to the nature of Bond's testimony. Counsel responded that the witness would testify as to certain photographs and that ". . . he is going to impeach two statements of Mr. Hoffman." The court then inquired of defense counsel whether he would turn over, at the completion of Bond's testimony, the relevant portions of the document to the prosecution. Defense counsel refused. The court thereupon indicated that those portions of the testimony dealing with the impeachment would be excluded.[4] After an extended colloquy in which the judge fully explained that he would only require the defense to permit inspection of those portions of the memo-

[3]"THE COURT: . . . The Court is going to rule as follows: first of all, the government may not have the memorandum until the witness has taken the stand and has indicated the particular impeaching testimony which was the last part of Mr. Hoffman's testimony relative to his inability to distinguish between people of the black race. And if he does make such a statement, if he and Mr. Bond make such a statement, then I believe the government is entitled to an examination of the memorandum—not before that time—but after that time, after he has completed his entire testimony . . . .

"THE COURT: I will say this to assist you, Mr. Allis, while I think about it. I am sure there are no statements of any of the defendants contained in this particular memorandum, and my order is going only to this particular memorandum. I am not generalizing on any other memorandum or memoranda which you may have. It goes only to this particular memorandum involving the particular witness Hoffman. If you represent to me that there are matters contained therein, such as recitals by the defendants or your defendant, of course, I would view it imperative that you have the opportunity to excise that, perhaps after an in-camera session with the Court, or something of that nature." [R.T. 470-471].

[4]"THE COURT: Mr. Allis is an officer of the court, and [if] Mr. Bond is allowed to testify it would be necessary that those portions of Mr. Bond's investigative report which contain the statements of the impeached witness will have to be turned over to the prosecution; nothing else in that report.

"If Mr. Allis indicates to me that he refuses to do that, then I am not going to allow the particular witness to testify in that area. Now, it is entirely up to Mr. Allis as to what portion, if any, of Mr. Bond's testimony he wishes to elicit." [R.T. 520].

BEST COPY AVAILABLE

randum which dealt with the impeaching questions propounded to Hoffman, the court offered to expedite the trial by examining the report *in camera* and there excise such portions not relevant to the Hoffman impeachment. Defense counsel again rejected the court's offer with a statement of his position.[5] Defense counsel then proceeded with the examination of Bond as a defense witness, but did not ask him whether or not Hoffman had made the statement during the telephone conversation of April 6, 1973, ". . . that all blacks appear to be alike."

Obviously, the appellant is in no better position than if Bond had been called, testified that Hoffman had made the statements and on cross-examination was asked if he had made any notes at the time of the telephone conversation, responded that he had and then the prosecutor had asked for the production of the notes. If defense counsel, after a direct order from the judge, failed to produce the notes for inspection, the judge, no doubt, would have ordered the testimony stricken and the jury would have been instructed to disregard it. Here, as often happens in a well-tried case, the judge and the attorneys anticipated the problem and defense counsel was saved the embarrassment of having the testimony stricken in the presence of the jury. It may have been a good trial tactic, but I do not believe appellant is entitled to cash in on it.

The record is clear that defense counsel had the Bond statement on his desk and was utilizing it in connection with the cross-examination of Hoffman. If the trial had followed the customary course and Bond had taken the witness stand, without the preliminary discussions and the court's advisory ruling on the production of the statement, Bond, no doubt, would have said that he used the statement to refresh his memory. For that matter, the record of the proceedings necessarily points to this conclusion. Additionally, there was nothing amateurish about defense counsel's performance and it would be doing him a great injustice to

[5] "MR. ALLIS: My position at this time, your Honor, Rule 16 is that the other discovery consents in the Federal Court, that the Fourth, Fifth and Ninth Amendments protect the defendant in whose possession the reports are from turning them over for any reason.

"THE COURT: We are not talking about pretrial discovery. This is post testimony discovery. It has been carefully considered by the Court, and I am narrowing my ruling to the very specific area." [R.T. 526].

assume that he did not properly prepare the witness by having him read the memorandum. In these circumstances, the price a defendant must pay for having a witness take the witness stand, and testify contrary to declarations of another witness, is to throw open the entire subject to normal cross-examination and to make his testimony vulnerable where, otherwise, it might have been shielded. Surely, the appellant cannot claim for this witness a right which was not available to himself if he had taken the witness stand under the same circumstances.

Closely in point is *Harris v. New York*, 401 U.S. 222 (1971), where the court approved the introduction of a statement on cross-examination which could not have constitutionally been utilized on the direct examination of the defendant. There the court held that the defendant, having voluntarily taken the stand, was under an obligation to speak truthfully and accurately, and that in confronting him with his previous statement, the prosecution was doing no more than utilizing the traditional truth-testing devices of the adversary process. Here, if produced, the memorandum might show that Bond did not include the alleged material forming the basis for the impeaching questions to Hoffman. If that were true, the integrity of Bond's testimony would be severely diminished. The prosecutor, in requesting the production of the statement for cross-examination, was doing ". . . no more than utiliz[ing] the traditional truth-testing devices of the adversary process." 401 U.S. at 225. One of the most common practices employed in the art of cross-examination is to ask for the production of any notes or statements which a witness may have used to refresh his recollection.

The purpose of a trial is to develop the truth, not suppress it. We can assume that appellant's counsel was not playing games and that the memorandum probably made no reference to the impeachment questions propounded to the witness Hoffman. Otherwise, there would be no logical reason for the refusal to produce it.

My conclusions with reference to the questions propounded to Hoffman are equally applicable to the questions propounded to the witness Van Gemeren.

We are not here confronted with pretrial discovery proceedings, such as those before the court in the California cases cited by

the majority, and *United States v. Fratello*, 44 F.D.R. 444, 449, 451 (S.D. N.Y. 1968), speaking to the same type of procedure. Much more akin to our problem, as recognized by the majority, is *Williams v. Florida*, 399 U.S. 78 (1970), where a state notice of alibi statute was upheld in the face of a Fifth Amendment constitutional challenge.

United States v. Wright, 489 F.2d 1181 (CA DC 1973), is closer to the target, but is distinguishable on at least three important grounds: (1) in *Wright* the order was overly broad and required defense counsel to surrender for inspection the entire report, rather than the specific portions relevant only to the impeaching question; (2) there, the prosecutor was seeking the statement to use it as substantive evidence, rather than for impeachment purposes; and (3) *Wright* recognizes, as a Hornbook rule of evidence, that had the investigator used parts of his report to refresh his recollection, the prosecution would be entitled to examine those parts of the report relating to impeachment, and would be permitted to make use of them in the cross-examination. The opinion then goes on to emphasize that the investigator *did not* use the report to refresh his recollection. In *Wright*, there was evidently nothing in the record to warrant the court in assuming that the statement in the investigative report was used by the witness to refresh his recollection. Here, as previously mentioned, I feel that the presence of the statement on counsel table, his use of the statement in interrogating Hoffman and his lengthy colloquy with the court and opposing counsel would clearly indicate that Bond had so refreshed his recollection.

Rule 612, Proposed Federal Rules of Evidence, as submitted to the Congress by the Supreme Court, permits an adversary to inspect, cross-examine on and offer in evidence portions of a writing used by a witness to refresh his recollection either before or while testifying. The House has proposed an amendment which would require the court, in its discretion, to pass on whether the interests of justice would be served by divulging the contents of the writing. The proposed legislation is in line with the *in camera* inspection here suggested by the trial judge. In any event, it is crystal clear that the decision in *Wright* turns on the overbroadness of the order requiring the production of the report. We quote from page 1189:

23A

> "In addition, the rules governing documents used to refresh recollection could in no event justify requiring Reeves to turn over his entire investigative report to the prosecution. As a defense witness Reeves testified only as to two matters—his interview with Richardson on January 19 and his examination of the lighting conditions at the scene of the crime. Assuming they had been used to refresh his recollection at trial, those parts of his investigative report relative to this testimony and of possible use to the Government in cross-examining Reeves with respect to this testimony would have to be turned over to the prosecution."
>
> • • • • •
>
> "Even if Reeves used the report to refresh his recollection, only those parts of the report relating to his testimony on direct need have been turned over to the Government."

Here, the majority concedes that the order was stated with precision and limited to the challenged areas of impeachment.

As repeatedly stated by the trial judge, we are not here concerned with the Jencks Act, 18 U.S.C. § 3500, or with Rule 16, FRCrimP. Our problem centers on a simple common law evidentiary question of whether a witness, who was called for impeachment purposes, must produce the notes he admittedly made on the subject of impeachment.

Finding no error, I would affirm the judgment of the lower court.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 8-20-74—480

24A

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

No. 73-2279, No. 73-2678, No. 73-2280

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TOMMIE LOUIS BROWN; VIRGIL DAVID SWAIN; ROBERT LEE NOBLES, DEFENDANTS-APPELLANTS

D.C. No. 12113

APPEALS from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the transcript of record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed in part, reversed in part, remanded.

Filed and entered June 10, 1974.

APPENDIX C

In the United States Court of Appeals for the Ninth Circuit

No. 73-2279, No. 73-2678, No. 73-2280

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TOMMIE LOUIS BROWN; VIRGIL DAVID SWAIN; ROBERT LEE NOBLES, DEFENDANTS-APPELLANTS

Before ELY and KILKENNY, Circuit Judges, and ENRIGHT, District Judge*

Order—Filed September 23, 1974

Judges Ely and Enright have voted to deny the Petition for Rehearing in the subject cases. Judge Ely votes to reject the suggestion for en banc rehearing, and Judge Enright recommends the rejection of such rehearing. Judge Kilkenny votes to grant panel rehearing and, alternatively, recommends the adoption of the suggestion for en banc rehearing.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

U.S. GOVERNMENT PRINTING OFFICE: 1974

BEST COPY AVAILABLE